

# EXHIBIT 1

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS  
CENTRAL DIVISION

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**ELAINE L. CHAO**, Secretary of Labor,  
United States Department of Labor,  
\*  
\* Plaintiff \*  
\* CIVIL ACTION  
\*  
\* v. \* File No. 4:04 cv 40065-FDS  
\*  
**BRIAN M. ANGER, NDI INTERNATIONAL,  
INC. and NORTHEAST DISPLAY, INC.  
401(k) SAVINGS AND INVESTMENT PLAN,** \*  
\* Defendants \*  
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DECLARATION OF CAROL S. HAMILTON IN SUPPORT OF PLAINTIFF'S  
APPLICATION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY  
INJUNCTION

COMMONWEALTH OF MASSACHUSETTS :  
: SS  
COUNTY OF SUFFOLK :  
:

Carol S. Hamilton, being duly sworn on oath says that:

(1) She is a Supervisor in the Employee Benefits Security Administration, United States Department of Labor. ("EBSA");  
(2) Elaine L. Chao, the Secretary of Labor, United States Department of Labor (the "Secretary") is charged with responsibility for the enforcement of the fiduciary requirements of Title I of the Employee Retirement Income Security Act, 29 U.S.C. §§1001 et seq., ("ERISA").

EBSA is the Department of Labor agency charged with investigation of employee benefit plans under Title I of ERISA.

(3) The Northeast Display, Inc. 401(k) Savings and Investment Plan (the "Plan") is an employee pension plan which was established with an effective date of January 1, 1994 by NDI International, Inc. ("NDI"), the Plan's sponsor. The Plan provides retirement, death, and disability benefits to employees of NDI. Brian M. Anger is the President, Chief Executive Officer and majority shareholder<sup>1</sup> of NDI and adopted the Plan on behalf of NDI.<sup>2</sup> Attachment A, *Summary Plan Description for Participants of Northeast Display, Inc. 401(k) Savings and Investment Plan*. The Plan was funded by withheld employee contributions in amounts ranging from 1% to 15% of employee salaries in accordance with each participant's election. The withheld contributions on behalf of each Plan participant became assets of the Plan by operation of the ERISA plan asset regulation, 29 C.F.R. §2510.3-102.

(4) Monies withheld from employee paychecks as deposits to the Plan were to be forwarded to the Plan's custodian, Manulife Financial. In addition, the Plan contracted with CAF Pension Actuaries, Inc. to provide third party administrative services to the Plan.

(5) EBSA began an official investigation of the Plan on or about January 10, 2003, to evaluate whether any violation of Title I had occurred with respect to the Plan. The investigation disclosed that Brian M. Anger, President, Chief Executive Officer and majority shareholder of

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<sup>1</sup>Upon information and belief at all times relevant to this action, Anger owned approximately ninety-six (96) percent of the stock of NDI.

<sup>2</sup>On or about October 4, 2002, NDI filed for Chapter 11 bankruptcy protection. On or about April 16, 2003, the case was converted to a Chapter 7 proceeding. It is unclear at this moment, what if any money the Plan will receive under NDI's liquidation.

NDI, at all relevant times served as trustee of the Plan. As trustee of the Plan, Brian Anger is a fiduciary and party in interest with respect to the Plan within the meaning of ERISA §3, 29 U.S.C. § 1002. NDI served as the named Plan Administrator to the Plan. As such, NDI also is a fiduciary and party in interest with respect to the Plan within the meaning of ERISA §3, 29 U.S.C. § 1002. Attachment A, page 15.<sup>3</sup>

(6) The EBSA investigation of the Plan disclosed that trustee Brian M. Anger failed to ensure that employee contributions were deposited to the Plan. Specifically, over the period April 1, 2002 through September 30, 2002, approximately \$40,572.34 was withheld from employee paychecks as employee contributions to the Plan. These amounts have never been forwarded to the Plan. In addition, NDI did not segregate these voluntary employee contributions from NDI's general assets. By failing to segregate the employee contributions, NDI was able to convert the employees' contributions to its own use to pay its creditors.

(7) During the course of the investigation, Plan trustee Brian M. Anger was interviewed and admitted that "in May or June" 2002, he was aware that employee contributions were not being forwarded to the Plan. Despite this knowledge, Mr. Anger took no steps to correct the failure to forward contributions. Mr. Anger stated that he made the decision to satisfy the corporate obligations of NDI to the exclusion of forwarding employee contributions to the Plan. Attachment C, *Report of Interview of Brian M. Anger of October 15, 2003.*

(8) Via letter dated February 28, 2003, the Plan's third party administrator reminded Mr. Anger that employee elective deferrals for the period April 1, 2002 through September 30, 2002 in the total amount of \$40,572.34 had not been forwarded to the Plan. Attachment D, *February*

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<sup>3</sup> Attachment A indicates that William P. Utley served as Trustee of the Plan. Upon information and belief, Mr. Utley resigned as trustee on or about February 9, 2001 as shown in the resignation letter contained in Attachment B, appended hereto.

*28, 2003 letter from Michael Fallon, Consulting Actuary, CAF Pension Actuaries, Inc. to Brian Anger.*

(9) The investigation further disclosed that Brian M. Anger failed to ensure that employee contributions for the months of April and October 1998 were deposited to the Plan. The Secretary estimates that the amount of unremitted contributions for April and October, 1998 is \$24,346.86. Manulife Financial has confirmed that it never received Plan contributions for the months April and October 1998.

(10) Based upon its investigation, EBSA estimates that the total amount of withheld, but unremitted, employee contributions to the Plan is \$65,346.86. As additional proof, attached are NDI payrolls records evidencing the amounts withheld from employee paychecks for deposit to the Plan. Attachment E, *Payroll Adjustment Journals for NDI created by corporate payroll provider, Paychex, Inc.*

(11) The investigation also revealed that, in those instances where employee contributions actually were deposited to the Plan, the deposits were consistently made in a delinquent fashion. That is, contributions to the Plan were made beyond the time permitted under the ERISA plan asset regulation.

(12) Based upon the findings of the investigation, EBSA concluded that Plan trustee Brian Anger breached his fiduciary duties to the Plan by: (a) failing to act solely in the interest of the Plan's participants and beneficiaries and in accordance with the Plan's governing documents contrary to ERISA §404(a)(1)(A) and (D), 29 U.S.C. §1104(a)(1)(A) and (D); (b) engaging in a series of prohibited transactions in violation of ERISA §406(a)(1)(D), 29 U.S.C. §1106(a)(1)(D); and (c) by engaging in self-dealing with respect to the Plan's assets in violation of ERISA §406(b)(1) and (2), 29 U.S.C. §1106(b)(1) and (2).

(13) Upon conclusion of the investigation, EBSA referred this matter to the Office of the Regional Solicitor, United States Department of Labor, for purposes of filing a Complaint in this

matter.

I declare under penalty of perjury that  
the foregoing is true and correct.

Executed on June 25, 2004



Carol S. Hamilton  
Supervisor  
Employee Benefits Security Administration  
United States Department of Labor